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# Comment on Preliminary Report on Freedom of Expression and Campus Harassment Codes

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TERRANCE SANDALOW.<sup>1</sup> Campus harassment codes pose an unprecedented problem for the AAUP, not only because the issues of academic freedom they raise are novel, but also because the academic community is itself deeply divided over those issues. Historically, the major assaults upon academic freedom have come from outside the academy—from politicians, trustees, and donors who have sought to limit inquiry and restrict the expression of unpopular views. Ideas about academic freedom have been shaped in the course of repelling these assaults and in constructing barricades that will safeguard the freedoms to teach and to learn that are at the center of the academic enterprise. Perhaps it is not surprising, in these circumstances, that the rhetoric of academic freedom should have tended toward the absolute. Time, however, has a way of unsettling absolutes, bringing problems not previously anticipated or, if anticipated, not fully appreciated. The inter-group tensions that have led many institutions to adopt harassment codes are just such a problem. The extraordinary controversy that the codes have generated within the academic community suggests, at the very least, a need to consider whether the traditional rhetoric of academic freedom—rhetoric designed to address concerns quite remote from those that have led to adoption of the codes—suffices to guide judgment concerning the issues they raise.

The position staked out by Ernst Benjamin reveals the inadequacy of yesterday's absolutes for addressing today's problems—though, to be more precise, the absolutes he invokes are not yesterday's, but those of the day before yesterday. At the center of his argument is the distinction between "speech" and "conduct." The latter, he maintains, is an appropriate subject of regulation, but the former must be absolutely protected, save when violence is imminently threatened. The report's failure to observe that distinction, he concludes, leads it to err in two directions: first, by failing to consider the need for institutional regulations prohibiting harassing conduct, and second, by approving even the narrow restrictions on speech that the report sanctions.

With respect to the first of these criticisms, Benjamin has simply misread the report. The initial paragraphs of the report explicitly recognize the need for institutional regulations prohibiting not only violence and vandalism, but other forms of "physical harassment," a phrase that clearly encompasses all of Benjamin's examples of conduct that is objectionable without regard to the content of the words that accompany it.

<sup>1</sup>The remarks that follow should not be construed as those of the other members of the subcommittee, who have not had an opportunity to comment on them.

Benjamin's central disagreement with the report is with its conclusion that institutions may, without violating academic freedom, prohibit "status" epithets and the like that are directed at one or a small number of individuals with the intention of degrading or humiliating them. Despite the assaultive character of such speech, Benjamin concludes that it falls on the protected side of the speech/conduct dichotomy that plays so large a role in his thinking about academic freedom. Students of the First Amendment have long recognized, however, that the distinction between speech and conduct will not bear the weight that Benjamin puts upon it. Words may at times be prohibited precisely because of their content. Conversely, conduct may at times be protected by any reasonable conception of academic freedom because the objections to it concern only its communicative impact. To put the point somewhat differently, the distinction between what is protected and what is unprotected by academic freedom depends upon a more refined analysis than the dichotomy between speech and conduct can provide.

Benjamin comes close to recognizing the point when he acknowledges that "fighting words" may be prohibited, at least in the face of imminent violence. Similarly, as the report observes, "[t]hreats of violence and other forms of intimidation, even if purely verbal, are well beyond the bounds of academic freedom." Yet in each of these instances, as well as others that should come readily to mind, words are prohibited solely because of their content. Conversely, as the Supreme Court's recent flag-burning decisions should remind us, a serious question of academic freedom would be raised if a university were to attempt to punish a fraternity for burning a cross on the latter's own property. Or suppose that a group of students repeatedly place under the doors of black students' dormitory rooms fliers that contain nothing more than a string of demeaning racial epithets. Benjamin's analysis leads one to suppose that he might regard such behavior as sanctionable conduct because it violates "rights of privacy which protect against unreasonable intrusions into one's living space. . . ." If so, would the same result obtain if another group of students were repeatedly to place under the doors of the same black students fliers announcing the meetings of the local Young Democrats and stating that minority students are especially welcome? All that distinguishes the two situations is the content of the two communications. Must we conclude, then, that the university must either permit or prohibit both actions on identical terms?

As these illustrations indicate, the speech/conduct dichotomy is too crude a response to the complex issues raised by campus harassment codes, however useful it may have seemed when dealing with such earlier issues as whether Communists should be allowed to teach or speak on campus. The simple answer to Benjamin's question—"Are we really prepared to establish a category of forbidden speech?"—is "of course." The only serious question is "what categories of speech may be forbidden without trenching upon the values that academic freedom is designed to serve." On that question, the difference between Benjamin and the subcommittee is, though not trivial, much narrower than one might gather from his comments.

We agree, in the words of the report, that "within a college or university . . . there can be no forbidden

ideas." We thus agree that codes which seek to protect the members of designated groups from a "hostile environment" by prohibiting the expression of certain ideas are inconsistent with the principles of academic freedom. We also agree that the mere use of "status" epithets should not be prohibited. However offensive they may be, their use is often closely linked to the expression of ideas.

The only disagreement between Benjamin and the subcommittee is whether the use of "status" epithets and the like may be proscribed in very narrow, well-defined circumstances, when they are directed at specific individuals with the intent of degrading or humiliating them. The subcommittee's position is that such utterances are more nearly assaultive than communicative, more akin to threats than to the communication of ideas. Benjamin does not dispute that judgment, nor does he make any attempt to suggest how the values academic freedom serves would be advanced by protecting such behavior. But if, as the report argues and Benjamin does not deny, such verbal assaults are "not merely outside the dialogue of reason that is the *raison d'être* of academic institutions, but inimical to it," what reason can there be for arguing that they are protected by academic freedom? The closest Benjamin comes to offering a reason is his contention that the subcommittee's failure to propose a ban on all abusive epithets demonstrates that its real concern is with the ideas expressed by "status" epithets, not with their assaultive quality.<sup>2</sup> The subcommittee was not, however, charged with addressing the relationship between academic freedom and civility norms in general, but only with considering the issues of academic freedom posed by the wave of recent harassment codes. In any event, the report clearly sets out the subcommittee's conclusion that prudential considerations, not principles of academic freedom, "counsel against any general attempt to proscribe" extreme personal abuse. But the report recognizes that the balance of prudential consideration might well be thought to shift when personal abuse involves the use of "status" epithets. To ignore the difference between calling someone a "dirty, mother-fucking son-of-a-bitch" and calling him a "dirty, mother-fucking faggot kike" is simply to ignore the social realities of the world in which we live. Epithets like the latter, as the report argues, "attack attributes of an individual that are often central to personal identity, [and] to the extent that [these] attributes are [also] the basis of widespread invidious discrimination, the injury [they inflict on] the individual is likely to be cumulative and, therefore, felt with special intensity." Surely, institutions need not be insensitive to such differences in deciding whether disciplinary action is appropriate.

Benjamin—who in this respect is joined by Donald Wagner—does make one valid point. The report does not detail with adequate clarity the precise speech that institutions may appropriately proscribe when it is

<sup>2</sup>The report does not, in fact, propose prohibiting the use of "status" epithets, even when they are directed at specific individuals with the requisite intent. It merely concludes that institutions that do penalize the use of "status" epithets in such circumstances do not violate the principles of academic freedom. The decision whether to adopt a code containing such prohibition depends upon a number of prudential considerations that differ in different institutional settings.

directed with the requisite intent at specific individuals, though I think the criticism would have greater force if it were addressed to a code rather than a statement designed to elaborate general principles. Still, vagueness is a vice especially to be avoided when restrictions on speech are involved.

My own view, on reflection, is that the report should have avoided such phrases as "similar locutions." The only explanation—not justification—for their inclusion is the concern that the phrase "status epithets" would not encompass some speech that comes with the report's rationale. Assume, to vary slightly the illustration offered earlier, that a student places under the doors of black students' dormitory rooms a flier that contains only demeaning caricatures of blacks—i.e., instead of the epithet "saucerlips," it contains a picture of a person with Negroid facial characteristics and large, elongated lips; instead of "jungle-bunny," a picture of a rabbit with Negroid facial characteristics; and so on. If the distribution of the flier containing the epithets can be proscribed, surely the same must be true of the caricatures. Instead of addressing such problems with such vague phrases as "similar locutions," the report should have defined more precisely the speech the subcommittee had in mind—as, indeed, it did at one point, by referring to "representations . . . deliberately employed to degrade or humiliate those at whom they are directed."

Professor Wagner's dissection of the report's language demonstrates that he is a very careful reader. Unfortunately, it also demonstrates that he exercises that care very selectively. Whatever uncertainties might have been created by the report's use of such phrases as "similar locutions," it cannot plausibly be read as sanctioning discipline of a faculty member who assigns *Piss Christ* or—however lamentable it may be—who speaks "derisively" in class about "evangelical Christianity" or the other subjects he mentions. The subcommittee's position, stated repeatedly in the report, is that there are no forbidden ideas and that even "status" epithets and the like may be prohibited only when they are directed at one or a small number of individuals with the intention of degrading or humiliating those at whom they are directed. Only by a willful misreading can one find in the report the uncertainties that Wagner purports to find.

Jonathan Penner raises very different issues. He lauds the report's conclusion concerning the need for unrestricted expression of ideas and apparently accepts—at least he does not object to—the narrow restrictions upon the use of "status" epithets that it sanctions, but he objects to the conclusion that faculty members are responsible for dealing with student use of "status" epithets in the classroom. Penner's initial concern is that faculty members lack the means to discharge that responsibility. But it both misconceives the issue and is just plain wrong to assert, as Penner does, that, "[e]xcept by the administration of physical force, no one can exercise control over anybody else."

Assume, for example, that a student in a course on immigration policy repeatedly and derisively refers to Hispanics as "spics" and "wetbacks." Unless one supposes that faculty members have no responsibility for maintaining a classroom atmosphere conducive to the education of their students—surely a novel position—is it plausible to maintain that the faculty member who allows these epithets to pass without comment has dis-

charged his obligation as a teacher? Just how the student's choice of language is to be dealt with is, obviously, a matter with respect to which a faculty member must have a large measure of discretion. Initially, and depending upon the circumstances, a faculty member might speak privately to the student, engage the class in a discussion about the use and abuse of epithets, or even—though personally I would regard it as inappropriate—permit the first use to pass without comment. But as the student persists, the faculty member's obligation to, say, Hispanic students in the class surely calls for additional measures—perhaps a refusal to recognize the student, perhaps exclusion from the class. Institutional review of the adequacy of these responses is no less appropriate than is institutional review of the adequacy with which any other professional obligation is met.

Penner's second objection—that there is no general agreement "on what must be rebutted" or "on what constitutes 'false or pernicious' speech"—misconceives the subcommittee's position on the responsibility of faculty members for what occurs in their classrooms. The two paragraphs that discuss that responsibility appear in a section of the report devoted to the means by which institutions may respond to the use of offensive "status" epithets in situations in which disciplinary action is inappropriate. As earlier portions of the report state in the most forceful terms, the subcommittee does not contemplate—indeed would reject any suggestion—that faculty members should impose a standard of "political correctness" upon their students. No doubt, many ideas may be expressed in a class that will cause distress to some or all of its members. Those ideas are to be dealt with like any others, subjecting them to the tests of evidentiary support and of reasoned analysis. The gratuitous use of "status" epithets is to be treated differently, at least in part, precisely because they often cannot be dealt with in that way.

I am uncertain whether Professor Penner believes that faculty members should be free to ignore the gratuitous use of "status" epithets in the classroom, but others have made that claim, contending that the use of such language is protected by academic freedom. Though I cannot fully argue the point here, it seems worth stating, if only in conclusory terms, what I once would have thought too obvious to mention, that not every use of language that is permissible in the street is also permissible in the classroom.

I can deal more briefly with the comments of Lawrence White and Jon Wiener, both of whom generally agree with the positions developed in the report. White's comments, however, reflect unease—if not explicit disagreement—with the narrowness of the restrictions on speech that the subcommittee regards as compatible with academic freedom. White agrees, if I understand him correctly, that ideas are protected, but he seems inclined to extend harassment codes to a category of speech or conduct that he regards as offensive, but that does not, in his view, involve the expression of ideas. But the offensiveness of the conduct involved in the only illustration of the point he offers, the *George Mason* case, seems to depend precisely on the ideas that are being expressed. Perhaps I do not fully understand his point, but without further elaboration, it is not clear, at least to me, precisely what additional restrictions on speech White would propose.



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Wiener's argument in support of the subcommittee's view that institutions may proscribe the use of "status epithets" in narrow circumstances relies heavily on the Supreme Court's "fighting words" doctrine. Though that doctrine surely is not, as Ernst Benjamin mistakenly supposes it is, "judicially discredited," the subcommittee deliberately avoided relying primarily on it. The doctrine, as its name implies, has come to be associated primarily with speech that creates an imminent risk of violence. It is, for that reason, limited

to face-to-face insults. The subcommittee's view is that speech may at times come within the criteria stated in the report even though imminent violence is not threatened, as for example when fliers containing only demeaning racial epithets are placed under the doors of black students' dormitory rooms. I suspect that Professor Wiener shares the subcommittee's view that written communications of this type are as objectionable—and as appropriately subject to discipline—as are oral ones.